

228669

BEFORE THE
SURFACE TRANSPORTATION BOARD

CARGILL, INCORPORATED

Complainant,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42120

ENTERED
Office of Proceedings

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Public Record

COMPLAINANT'S
PETITION FOR PARTIAL RECONSIDERATION

CARGILL, INCORPORATED

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Dated: January 24, 2011

Attorneys for Complainant

CARGILL, INCORPORATED)	
)	
Complainant,)	
)	
v.)	Docket No. 42120
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

- 1 -

6. BNSF's collection of fuel surcharges from Cargill under the Assailed Tariff Item constitutes an unreasonable practice under 49 U.S.C. § 10702(2) because the general formula set forth therein to calculate fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied.

7. BNSF's collection of fuel surcharges from Cargill under the Assailed Tariff Item constitutes an unreasonable practice under 49 U.S.C. § 10702(2) because BNSF is using the Assailed Tariff Item to extract substantial profits over and above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied.

8. BNSF's collection of fuel surcharges from Cargill under the Assailed Tariff Item constitutes an unreasonable practice under 49 U.S.C. § 10702(2) because BNSF is double recovering the same incremental fuel cost increases BNSF has incurred in providing common carrier service to Cargill by (i) setting its base rates on Cargill traffic to include recovery of fuel prices higher than the BNSF fuel strike price of \$0.73 per gallon implicit in the Assailed Tariff Item and (ii) by increasing the Cargill base rates (including the fuel component in the base rates) via rate adjustments and, at the same time, requiring Cargill to pay, in addition to the adjusted rates on these movements, the fuel surcharge set forth in the Assailed Tariff Item.

Id. at 3-4.

On May 28, 2010, BNSF moved to dismiss the allegations set forth in paragraphs 7 ("Profit Center Claim") and 8 ("Double Recovery Claim"). Cargill responded in opposition to BNSF's motion on June 17, 2010. In a decision served

on January 4, 2011, the Board denied BNSF's motion to dismiss Cargill's Profit Center Claim, but granted BNSF's motion to dismiss Cargill's Double Recovery Claim because the later claim did not contain "any allegations of misleading or inconsistent representations to shippers." *Id.* at 6. The Board also expressed "practical concerns" about attempting to "deconstruct a base rate" to identify the fuel cost component in that rate. *Id.* Finally, the Board held that "when a railroad imposes a fuel surcharge and also increases the base rate, but without making express reference to an index that includes a fuel cost component, the railroad is not making inconsistent representations." *Id.* at 5.

ARGUMENT

"Motions to dismiss are disfavored and rarely granted"² and the Board has encouraged rail shippers to bring claims concerning unreasonable fuel practices to the Board.³ However, to date, Cargill is only the second shipper to do

² Order at 4.

³ See *Rail Competition and Service: Hearing Before the H. Comm. on Transp. and Infrastructure*, H.R. Rep. No. 110-70, at 23 (2007) (statement of the Hon. Charles Nottingham) ("[t]he Board will aggressively use the authority granted us by statute to stop unreasonable [fuel surcharge] practices, thereby protecting shippers and advancing the public interest" and "will remain vigilant on this issue").

so despite widespread concerns over railroad fuel surcharge practices.⁴ Cargill's Double Recovery Claim raises issues of first impression since a similar claim was not raised in the only other fuel surcharge complaint case – *Dairyland*.⁵ The Board should amend its Order to permit Cargill to replead its Double Recovery Claim in a manner that conforms to the Board's rulings in the Order.

A. Cargill Can Replead Its Double Recovery Claim to Comply with the Order

The Board granted BNSF's motion to dismiss Cargill's Double Recovery Claim because it failed to include "allegations of misleading or inconsistent representations to shippers." Order at 6. BNSF has repeatedly represented that its fuel surcharges are intended to obtain recovery only of fuel cost increases not recovered in their base rates. For example, in 2006, BNSF represented to its shippers and the Board that "[s]ince it began in 2001, the goal of BNSF's fuel surcharge has been to ensure that BNSF is compensated *for increases in the cost that were not embedded in the transportation rate offered to the*

⁴ See U.S. Dep't of Agric. and U.S. Dep't of Transp., *Study of Rural Transportation Issues* at ix (Apr. 2010) ("There is considerable evidence that railroad fuel surcharges recovered more than the additional cost of fuel, artificially boosting railroad profits.")

⁵ *Dairyland Power Coop. v. Union Pac. R.R.*, STB Docket No. 42105 (STB served July 29, 2008).

customer” and that “BNSF never intended that fuel surcharges be sources of additional operating income for the railroad.”⁶ Similarly, in 2010, BNSF announced that it was resetting the Highway Diesel Fuel “strike price” at which BNSF assesses a fuel surcharge from \$1.25 per gallon to \$2.50 per gallon beginning January 2011. BNSF also announced that in order to avoid under or over recovery of its incremental fuel cost changes, shippers’ “*base rates will be appropriately adjusted to reflect the new strike price.*”⁷

Cargill now has the benefit of the Board’s guidance on how to properly plead its Double Recovery Claim. Cargill respectfully requests that the Board modify its Order on reconsideration and direct that Cargill may amend its Double Recovery Claim to include misrepresentation allegations. Granting the requested relief is also consistent with the Board’s July 2009 decision in *Dairyland*.

⁶ Comments of BNSF Railway Company at 2, *Rail Fuel Surcharges*, STB Ex Parte No. 661 (filed Oct. 2, 2006) (emphasis added) (“BNSF Ex Parte 661 Comments”).

⁷ BNSF Pricing Update to All BNSF Carload Customers (dated July 26, 2011) at 1 (emphasis added) (*see* [http://domino.bnsf.com/website/updates.nsf/updates-pricing industrial/232B06C2A76808AF8625776C006DA426?Open](http://domino.bnsf.com/website/updates.nsf/updates-pricing%20industrial/232B06C2A76808AF8625776C006DA426?Open)) (“BNSF Pricing Update”).

In *Dairyland*, the complainant shipper raised fuel surcharge practice claims of first impression. UP moved to dismiss. The Board did not dismiss the complaint, but instead provided the parties' guidance on the showings the complainant shipper needed to make to prove its unreasonable practice allegations.⁸ In its Order, the Board has now provided similar guidance to Cargill on how to properly plead its Double Recovery Claim. Permitting Cargill to amend its Double Recovery Claim will produce the same result the Board reached in *Dairyland* – the claim at issue can be pursued in a manner consistent with the Board's instructions.

B. Repleading the Double Recovery Claim Will Address the Board's Remaining Concerns

Adding allegations of BNSF's representations to a repleaded Double Recovery Claim will also address and resolve the Board's concern about attempting to "deconstruct a base rate." Order at 6. Clearly, BNSF is deconstructing its base rates, otherwise it could not make statements such as the fuel surcharges it imposes reflect fuel costs "not embedded in the transportation rate offered to the customer" (BNSF Ex Parte 661 Comments at 2) and, in rebasing fuel surcharge strike prices, the "base rates will be appropriately adjusted to reflect

⁸ The Board found that Cargill's Profit Center Claim properly adhered to the Board's guidance in *Dairyland*. Order at 4-5.

the new strike price” (BNSF Pricing Update at 1). While the Board “does not attempt” to deconstruct base rates (Order at 6), the issue here is not the Board’s practices – but BNSF’s – and by its own admission BNSF does separately identify the fuel component in its base rates. Moreover, as the Board itself has held, a fuel surcharge must be “limited to recouping increased fuel costs that are not reflected in the base rate.” *Rail Fuel Surcharges*, STB Ex Parte No. 661 at 4 (STB served Aug. 3, 2006).

Similarly, if, as BNSF represents, it is using a fuel surcharge to recover fuel costs “not embedded in the transportation rate offered to the customer” (BNSF Ex Parte 661 Comments at 2) it is making inherently inconsistent representations when it applies a rate adjustment procedure, even one based on an index that excludes a fuel component, to the entire base rate, while at the same time collecting a fuel surcharge. This is because the fuel cost component embedded in the base rate must be treated as a fixed cost and held constant while the other rate components are adjusted by the chosen index. For example, assume that BNSF sets a base rate of \$2,000 per car on a movement with a base fuel cost component of \$200 per car, reflecting the fuel price at the fuel surcharge strike price; that a fuel surcharge of \$50 per car is applied to the movement; and that the entire base rate is adjusted by 5% using the All-Inclusive Index Less Fuel (“All-

LF”), an adjustor that does not reflect changes in fuel prices. Application of the AII-LF adjustor to the \$200 fuel component of the base rate produces a \$10 increase in the base fuel component ($\$200 \times .05$), an increase that is also captured by the \$50 fuel surcharge – i.e., a double recovery – even though BNSF has represented that no such double recovery has occurred because its fuel surcharge program is designed solely to recover fuel costs “not embedded in the transportation rate offered to the customer.” BNSF Ex Parte 661 Comments at 2.

CONCLUSION

For the reasons set forth above, Cargill requests that the Board modify its Order to permit Cargill to replead its Double Recovery Claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, that I have this 24th day of January, 2011 caused to be served copies of the above Petition for Partial Reconsideration by hand delivery upon outside counsel for Defendant BNSF Railway Company, as follows:

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